

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

AMERICAN ZURICH INSURANCE
COMPANY and ZURICH AMERICAN
INSURANCE COMPANY,

Plaintiffs,

v.

J. CRISMAN PALMER and GUNDERSON,
PALMER, NELSON & ASHMORE, LLP,

Defendants.

Case No. 20-cv-5026

COMPLAINT

COME NOW the Plaintiffs, American Zurich Insurance Company and Zurich North American Insurance Company, by and through their counsel of record as shown below, and for their Complaint in the above matter, state the following:

PARTIES

1. The Plaintiff, American Zurich Insurance Company, is an Illinois corporation engaged in the insurance business with a statutory home office and a principal place of business in Schaumburg, Illinois.

2. The Plaintiff, Zurich American Insurance Company, is a New York corporation engaged in the insurance business with a statutory home office in New York, New York and a principal place of business in Schaumburg, Illinois. American Zurich Insurance Company and Zurich American Insurance Company will be hereinafter referred to collectively herein as “Zurich.”

3. The Defendant, J. Crisman Palmer (“Palmer”), is an individual person who is a citizen and resident of the State of South Dakota.

4. The Defendant, Gunderson, Palmer, Nelson & Ashmore, LLP (“Gunderson Firm”) is a domestic Limited Liability Partnership organized and existing under the laws of the State of South Dakota, with a principal place of business in Rapid City, South Dakota.

JURISDICTION AND VENUE

5. The amount in controversy herein exceeds \$75,000.00.

6. The citizenship of the Plaintiffs is entirely diverse from the citizenship of the Defendants herein and jurisdiction therefore exists pursuant to 28 U.S.C § 1332.

7. Venue is proper in this District pursuant to 28 U.S.C § 1391 because all of the Defendants reside in this District and because a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTS

8. On February 27, 2015, a Complaint (the “Leichtman Complaint”) was filed in this District naming as defendants, among others, Zurich.

9. The Leichtman Complaint was docketed in this Court as No. 15-5012.

10. The named Plaintiff in the Leichtman Complaint was an individual person, a citizen and resident of the State of South Dakota, named Joseph E. Leichtman (“Leichtman”).

11. The Leichtman Complaint alleged Leichtman was an employee of Rommesmo Companies d/b/a Dakota Steel & Supply, Inc. between May 2001 and April 2009.

12. The Leichtman Complaint alleged Leichtman was injured in the scope and course of his employment, having suffered a fall on August 29, 2007.

13. The Leichtman Complaint alleged Leichtman suffered a compensable workers' compensation injury as a result of the above described fall.

14. The Leichtman Complaint alleged certain Zurich entities, including the Plaintiffs herein, provided workers' compensation insurance to Leichtman's employer.

15. The Leichtman complaint generally alleged certain Zurich entities, including the Plaintiffs herein, were guilty of "bad faith" with respect to the handling of Leichtman's claim for workers' compensation benefits.

16. Zurich retained Palmer and the Gunderson Firm, as legal counsel, to appear on their behalf in the matter of the Leichtman Complaint, to deny the claim of "bad faith," and to otherwise defend against the Leichtman Complaint.

17. The retention of Palmer and the Gunderson Firm by Zurich established an attorney-client relationship among and between them, and necessarily established that Gunderson and the Palmer Firm owed certain fiduciary duties to Zurich.

18. As counsel for Zurich, Palmer and the Gunderson Firm filed an Answer to the Leichtman Complaint in a filing with this Court on April 30, 2015.

19. Neither Palmer nor the Gunderson Firm alleged any separate and distinct affirmative defenses as part of the Answer to the Leichtman Complaint filed on April 30, 2015.

20. Following the Answer, an Order was entered in the matter of the Leichtman Complaint, setting a deadline of August 31, 2015 for the parties to amend pleadings.

21. On September 7, 2018, Palmer and the Gunderson Firm filed a Motion to Amend the Answer they had filed on behalf of Zurich, seeking to, among other things, add several affirmative defenses never before pled.

22. The Motion to Amend filed by Palmer and the Gunderson Firm was filed more than three years beyond the deadline this Court had imposed for pleading amendments in the matter of the Leichtman Complaint.

23. On August 28, 2019, this Court entered an Order denying the Motion to Amend, stating, among other things, “woefully absent is any explanation for the delay of three years in bringing the motion [to Amend].”

24. At the time Palmer and the Gunderson Firm filed the Motion to Amend, they also filed, as Zurich’s counsel, a Motion to Dismiss, asserting that the Leichtman Complaint should be dismissed based on, among other things, the new affirmative defenses of “release” and “res judicata” that the proposed amended Answer was seeking to assert.

25. When considering the Motion to Dismiss, the court refused to consider these affirmative defenses and denied the Motion to Dismiss, finding: “[b]ecause Zurich failed to plead release or res judicata in its original answer, both are deemed waived. As such, the court need not address the merits of either in the current Motion to Dismiss.”

26. Because the Motion to Dismiss was denied, Zurich was required to continue defending the case, to the additional detriment and damage to Zurich.

27. The failure of Palmer and the Gunderson Firm to timely assert necessary and dispositive affirmative defenses amounted to legal malpractice and caused significant damage to Zurich, as related to their defense against the Leichtman Complaint.

28. The conduct of Palmer and the Gunderson Firm created a conflict of interest that potentially disqualified them from any further representation of Zurich, and negated the ability of

Zurich to make informed decisions as related to the legal representation they sought from Palmer and the Gunderson Firm, and the defense of the Leichtman Complaint.

COUNT I – BREACH OF FIDUCIARY DUTY

29. As fiduciaries of Zurich, Palmer and the Gunderson Firm owed a duty to disclose to their clients the legal consequences of their failure to originally file necessary and dispositive affirmative defenses, their untimely delay in seeking an amendment to add necessary and dispositive defenses, and their inability to obtain court intervention to allow for an amendment to add necessary and dispositive affirmative defenses.

30. The duty to disclose owed by Palmer and the Gunderson Firm was ongoing, yet Palmer and the Gunderson Firm failed in making required disclosures to Zurich until the calendar year 2018.

31. Given their failure to disclose these legal consequences, Palmer and the Gunderson Firm breached their fiduciary duties owed to Zurich.

32. These breaches by Palmer and the Gunderson Firm were the cause of damages suffered by Zurich as related to their defense of the Leichtman Complaint.

33. Zurich suffered damages as a result of the breach of fiduciary duties owed to them by Palmer and the Gunderson Firm.

JURY DEMAND

COME NOW the Plaintiffs, and demand trial by jury of all issues so triable herein.

WHEREFORE, the Plaintiffs pray for relief as follows:

a. For compensatory damages as determined to be appropriate by the fact finder herein as related to their claims stated in Count I; and,

- b. For the Plaintiffs' costs and disbursements herein; and,
- c. For such other and further relief as the Court deems just and equitable in this action.

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Email: Doohen@whitfieldlaw.com

By /s/ Stephen E. Doohen
Stephen E. Doohen

ATTORNEYS FOR PLAINTIFFS, AMERICAN
ZURICH INSURANCE COMPANY and ZURICH
AMERICAN INSURANCE COMPANY

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

AMERICAN ZURICH INSURANCE COMPANY and ZURICH
AMERICAN INSURANCE COMPANY

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Stephen E. Doohen, Whitfield & Eddy, PLC, 699 Walnut Street, Suite
2000, Des Moines, IA 50309; 515-288-6041

DEFENDANTS

J. CRISMAN PALMER and GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

County of Residence of First Listed Defendant **Pennington**
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|---------------------------------------|---|---------------------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C § 1332; 28 U.S.C § 1391

Brief description of cause:
breach of fiduciary duty

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ **in excess of**
\$75,000

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE **US Magistrate Judge Daneta Wollmann** DOCKET NUMBER **5:15-cv-05012-JLV**

DATE

04/20/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ **Stephen E. Doohen**

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE